

# Proposed Changes in Pleading and Practice

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"If the law supposes that," said Mr. Bumble, "the law is a ass—a idiot." Since Dickens wrote those words a century ago, many fictions in the law have been abolished. However, in the year 1935 the law permits a plaintiff to sue Corporation A and Corporation B along with Mr. C and allege that the three defendants wilfully shot and fired a revolver. Yet that same law would not permit the plaintiff to sue these defendants upon stating the facts in plain language to the effect that Mr. C was working for Corporation A or Corporation B and while so working fired the shot.

Why does not the law abandon the legal subtleties which complicate litigation? Why does it not become more simplified at least in its procedural aspect? The legal profession, which is best able to bring about changes, is usually indifferent. There may even be some opposition to change because of an unwillingness to learn new ways.

In considering any change it must be recognized that the legal procedure represents the manner in which law is administered. It generally reflects the habits and attitudes of the group administering the law. Those habits and attitudes cannot be effectively formed or modified merely by an act of the legislature or by a rule of court. The effective change is rather the result of changing attitudes. For this reason changes must necessarily come gradually.

The Ohio State Bar Association has been considering for several years certain changes in pleading and practice. These changes will only be crystallized into new rules when a sentiment is built up supporting the change.

These various changes are proposed as a result of a single purpose, that of eliminating from litigation as many procedural

\* Portion of an address given before the Law Institute of the Akron Bar Association, February 4, 1935.

questions as possible. There is too much litigation of procedure. These questions accumulate like snow on a rolling ball, until the object is of an entirely different size and appearance. The lawyers know that too many times the questions finally considered by the court were entirely different from the ones that the parties were disputing when they first approached the courts.

This elimination of procedural questions can only be brought about by giving the courts greater discretion. There must be fewer rules which the court is obliged to follow under penalty of reversal. There must be fewer times when the attorney can say to the court, "You must do thus and so."

When a wider judicial discretion is advocated it must be admitted that this is in conflict with the certainty in the law which the practitioner desires. He longs for the time when he can predict with certainty for his client the legal consequences of certain specified behavior, at which time, by the way, there would be no need for lawyers. He sometimes is confused about the certainty for which he is looking. There is a desirability in having certainty in legal rules, especially certainty in the rules of procedure. But this does not mean certainty in the application of the rules, certainty in the result of litigation. Certainty in result means tyranny. The greatest certainty in the result of litigation probably occurs in Russia or Germany today. Certainty is the antithesis of judicial discretion.

The dread of judicial discretion often comes from an unwillingness to trust the judges, many of whom have come to the bench through the accidents of popular election. The entire program of rigid procedure came along about the same time as the popular election of judges. However, one wrong cannot be corrected by another, and one cannot expect to counterbalance the deficiencies of the judiciary with a rigid and inflexible procedure. Greater discretion must be given the judges. If they do no merit that discretion methods must be devised of getting judges who will. The first premise, therefore, as the basis of this discussion is that changes in procedure must be adopted which will give the courts greater discretion.

This discussion of trial procedure is limited to the certain proposals before the bar association and these relate to more liberal provisions of joinder and the adoption of summary

judgment procedure. These changes in joinder procedure were approved by the bar association about two years ago but sentiment has not yet crystallized into action.

Instead of discussing these new rules in the abstract, a few illustrations will be given which will more vividly present the problem. These cases are illustrative of the many similar cases that come within the experience of any lawyer.

In the first case the plaintiff was suing for damages arising out of personal injuries caused by a night watchman at certain railroad yards. A detective agency claims the watchman worked for the railroad and the railroad claims he worked for the detective agency. The plaintiff first chose to sue the railroad and when the testimony seemed to show employment by the agency the plaintiff dismissed his case. The plaintiff then commenced another action against the three defendants on the theory of joint liability, alleging that the three defendants fired the shot. The use of this fiction was necessary because there is no provision in Ohio permitting joinder in the alternative. Of course at the trial when the facts are brought out the plaintiff must elect the defendant against whom he wishes to continue suit. The sensible and economical procedure is to sue all parties in the alternative.

The second case was a personal injury action growing out of a collision caused by a truck operated by Armour & Co. It appeared that there were two corporations named Armour & Co., a Maine corporation and a Kentucky corporation. The driver did not know which company he worked for, although it was conceded it was one corporation or the other. The plaintiff can not sue these defendants in the alternative but must choose at his peril which defendant he wished to hold.

The third case was a personal injury action against an insurance company and the driver of an automobile. An important question in dispute was whether the driver was an agent or an independent contractor. If the latter, the company would not be liable and if the former, both would be liable but could not be sued together. The plaintiff can present this question only through the fiction of joint liability. But it seems inconsistent with the theory of the codes to admit that if a person would plead the facts and claims that plaintiff was either an independent contractor or an agent he would fail to state a cause of action. If this had been a contract case the plaintiff could

not have concealed the issue behind the concept of joint liability and he must at his peril elect whether to use the principal or the independent contractor.

The next case deals with possible joinder of plaintiffs. This case was one of three suits brought by three plaintiffs for money invested because of fraud of defendant stockbroker. Each of these three cases took several days to try and the real matters in dispute were questions of fraud and the liability of the bondsman. The facts concerning the amount of investment by each plaintiff were not in dispute. No provision exists for compelling the joinder of these claims, although they can be conveniently tried together at a great saving of expense to the state.

The last case was an action by a child for damages arising out of personal injuries. After a week's trial a verdict was returned for the defendant. However, the state had to finance a retrial of these same facts in two other suits. The father's suit for loss of services, and the suit by the mother for her injuries. This entire matter could have been tried in one suit.

Joinder provisions have been so complicated by legalistic distinctions that either side has a sporting chance of winning and the matter of trial conveniences is entirely lost sight of. With restricted public budgets this problem of the expense of litigation is no idle matter. If the public knew how much they are really being gypped by the complexities of our procedure they would be up on their hind legs howling. It may be that the lawyers' safeguard is to keep it complex. When one sees how slow the legal profession is sometimes to accept procedural reform, he is reminded of Bernard Shaw's statement that "a profession is conspiracy against the laity."

However, the legal profession should accept these changes not from the standpoint of society, although it would be responsive to such appeal, but from the standpoint of the professional interests in making court processes better able to accomplish the things they were set up to accomplish.

Now how can this matter be remedied. In 1875 England adopted a very simple procedure. There were no new concepts introduced that involve refined analysis, and prolonged litigation. It was there provided that parties, plaintiff or defendant, may be joined, either jointly, severally or in the alternative when common questions of law and fact exist arising out of the same transaction or series of transactions and that, whenever the

interest of the parties requires, the court may order separate trials. Also the court may order a consolidation of separate trials if the circumstances seem to warrant it.

This liberal procedure has been adopted in nine states. The last one was Illinois in the new practice act which went into effect a year ago, after the bar association of that state had worked on the act for two years.

All the present complexities of joinders will be wiped out and those problems in litigation will be eliminated. One will no longer be bothered with the intricacies of joint liability in automobile accidents. If the same facts are being litigated, the cases can be tried together. Similarly a master and servant could be joined as they can be in all but two or three states and a present resort to a fiction need not be necessary. Ohio is the only code state which does not permit the master to be sued with the servant when the master's liability is based solely on the acts of the servant. This result in Ohio is based on concepts of liability arising out of common law procedure which concepts have long been abandoned.

It is sometimes argued that with too free joinder a trial will be so complicated that a jury cannot handle the case. Ordinarily the interest of the plaintiff will keep him from unduly complicating his case and the court can protect a defendant if the circumstances are so unusual that special prejudice results.

A few years ago an investigation was made of the extent to which this freedom of joinder had been abused in New York. In checking over the cases for two years in New York County it was found there was not one time when the court was asked to grant separate trials because of prejudicial joinder. There were a good many instances where trials were consolidated, usually cases involving automobile accidents.

These simple changes in joinder requirements will eliminate many of the present problems based upon legalistic subtleties which infest our litigation and the trial courts will be empowered to control matters of joinder on the basis of trial convenience of the parties and in the interest of the state.

Another change in trial practice is being proposed. This involves giving the courts greater control over the issues to be tried, which control can be exercised by the use of the summary judgment procedure. Too many cases are placed on the trial calendar when there is no real issue presented by the answer.

This congests trial dockets and the state is required to furnish increased facilities. Many of these defenses are interposed for the purpose of delay or to force some sort of a compromise.

The remedy for this evil is the adoption of the summary judgment procedure. In contract actions or actions for the specific restitution of property, the plaintiff may file an affidavit supporting his claim upon which the court may enter judgment unless the defendant files an affidavit of merits showing a good defense to all or to some part of the claim. The court can, therefore, make this preliminary finding of an issuable controversy, and in case there is an issue made upon part of the controversy the trial can be restricted to that question.

This procedure was introduced in England in 1855, in Ontario in 1875, and has been adopted in seven states in this country. In New York it has proved so satisfactory that last year its use was much extended. In England in 1930 there were 5535 summary judgments rendered by the High Court of Justice and only 1226 judgments rendered after trial. That is, there were four and one half times as many summary judgments as trials. In Ontario the summary judgments outnumber the trials, three to two. In New York this percentage is not so great but there is a substantial percentage eliminated this way. Justice Finch in discussing the New York procedure said that in New York County in 1933 there were 1569 applications for summary judgments of which 988 were granted, and that if these cases had been tried two more judges would have been needed. In Detroit a recent study of the Michigan Judicial Council showed that for a period of eight months in 1931, 409 cases were disposed of by summary judgment and 1834 by trial. That is, about 20 per cent of the cases disposed of were by summary judgment.

This summary judgment procedure is almost imperative if and when justice courts are abolished and the cases are filed in a small claims branch of the common pleas court. A recent study of justice court litigation shows that practically all the civil cases before justice courts are of the type which are subject to summary judgments. There were less than 2 per cent which were of the damage variety. These cases usually do not involve disputed amounts but merely seek the court processes for collection of the debts. Such cases must be screened out of those awaiting trial.

This preliminary hearing of the issues by the court is a step in the direction of giving the court more control in the issue forming processes. Experience has shown that the pleading practices often involve evasion, subterfuge, and deception. The mere statutory requirement that the parties state the facts will not be enough to simplify pleading when the court permits the allegations of such general abstractions as the operative facts, together with the general or specific denials of those facts. The present system of pleading is almost as ritualistic as the common law system. In Franklin County last fall the judge on the motion docket ruled on 500 motions and demurrers, about ten each day. A great many of these involved a juggling of symbols and phrases according to accepted conventions without really disclosing the specific matters to be tried. Courts must step in and have more of a part in determining what the issues are, if any. A move in that direction is the summary judgment proceeding.

These changes are steps in the direction of elevating the position of the trial judge in the administration of justice. The settlement of the merits of the controversy will be the chief aim and the rules of administration will become merely means to that end. The practice of law will not be a mere game to be played by some intricate set of rules, but a serious attempt to settle the problems of litigating parties according to their broader social interests, and the administration of justice will to a greater extent merit public confidence and respect.